

2.1 Framework for Developing Restoration Plans

Given the varied circumstances of oil spills, a restoration plan should, to the extent practicable, be tailored to the particular incident. This chapter describes the framework for developing restoration plans under the OPA regulations that comply with NEPA.

Trustees should clearly understand that in the development of restoration plans, best professional judgment must be exercised. Sound judgment requires that a clear decisionmaking process is in place to initiate restoration actions. Trustees should ensure that a decisionmaking process for restoration planning and implementation exists for their agencies to facilitate this framework. Refer to Appendix D for additional guidance on trustee agency decisionmaking relative to restoration actions.

This chapter describes the procedural steps for developing restoration plans that comply with the requirements of both OPA and NEPA. Chapter 3 details the contents of such plans.

2.2 Restoration Planning Process under OPA

The OPA regulations describe a process for developing and implementing restoration plans. The major steps in developing restoration plans under OPA are listed below:

- Determine if restoration planning can and should be conducted;
- Issue the Notice of Intent to Conduct Restoration Planning (NOI);
- Invite responsible party(ies) (RP(s)) participate;
- Conduct injury assessment, restoration selection, and restoration scaling;
- Develop the Draft Restoration Plan (DRP);
- Issue the Notice of Availability (NOA) of DRP;
- Provide for public review;
- Prepare the Final Restoration Plan (FRP);

- Prepare and issue the Demand to the RP(s); and
- Implement the FRP.

The first step in this process calls for trustees to determine if they have jurisdiction to pursue restoration under OPA and, if so, whether it is appropriate to do so. If injuries to natural resources and/or services have or are expected to occur and feasible restoration alternatives exist to address such injuries, trustees may proceed with the restoration planning process. If trustees do proceed with the restoration planning process, they must publish a Notice of Intent to Conduct Restoration Planning (NOI/RP).¹

The trustees then evaluate potential injuries to natural resources and/or services and use that information to determine the need for and scale of restoration actions. Trustees must identify a reasonable range of restoration alternatives, evaluate and select the preferred alternative(s), and develop a Draft and Final Restoration Plan (DRP and FRP).²

Because OPA, like NEPA, requires that there be an opportunity for public review and comment,³ trustees must make the DRP available for review and comment by the public. The DRP, or a notice of its availability (NOA), should be published to allow this public review. This review of the DRP provides a vehicle for informing the affected and interested public of the results of the trustees' analyses and decisions. Public review can also supplement expert peer review when comments are solicited from various scientific experts or similarly experienced persons.

When developing the DRP, trustees must establish restoration objectives that are specific to the injuries addressed. These objectives should clearly specify the desired outcome. As appropriate, trustees should indicate the performance criteria by which successful restoration will be judged. At a minimum, trustees must determine what criteria will constitute successful completion of a RP's obligations in implementing restoration.⁴

¹ OPA regulations 15 CFR Subpart D - Preassessment Phase.

² OPA regulations 15 CFR Subpart E - Restoration Planning Phase.

³ OPA statute at § 1006(c).

⁴ OPA regulations at § 990.55(b).

After reviewing public comments on the DRP, trustees must develop a Final Restoration Plan (FRP).⁵ In response to the comments, the trustees may need to:

- Modify the restoration alternatives being considered;
- Develop and evaluate alternatives that were not given consideration by the trustees;
- Supplement, improve, or modify the analyses;
- Make factual corrections; and/or
- Explain why the comments do not justify further trustee response, cite the reasons to support the trustee position, and possibly indicate the circumstances that would trigger reappraisal or further response.

The FRP will become the basis of the demand for damages. After the Final Restoration Plan is developed, the trustees prepare a *demand*, which is the document that serves as a Record of Decision. Upon settlement of a claim based on the FRP, trustees must implement the final plan or oversee implementation of the final plan by the RP.

To facilitate implementation of the FRP, trustees should:

- Establish mechanisms to coordinate the implementation process;
- Develop workplans to implement restoration actions relative to the Final Restoration Plan;
- Develop a plan to monitor the success of restoration actions; and
- Evaluate the need for corrective actions.⁶

⁵ OPA regulations at § 990.55(d).

⁶ OPA regulations at § 990.66.

2.3 NEPA Planning Process

2.3.1 NEPA Application

NEPA comes into play when Federal trustees propose to take restoration actions that may *significantly affect the quality of the human environment*.⁷ NEPA provides for the identification of categories of actions that are excluded from NEPA application - the *categorical exclusions*.⁸ These exclusions generally apply to the types of actions that, individually or cumulatively, are not expected to have a significant effect on the quality of the human environment (e.g., actions with limited degree, geographic extent, and duration).

It is within the discretion of individual Federal agencies to determine which, if any, of their actions qualify for categorical exclusions. Each trustee must comply with his own individual agency guidelines when dealing with such exclusions.

When NEPA is applicable, Federal trustees should develop a DRP that will also serve as an Environmental Assessment or Environmental Impact Statement.

2.3.2 Environmental Assessment (EA)

Under NEPA, Federal agencies determine whether a proposed restoration action will have a significant effect upon the quality of the human environment. Generally, where it is uncertain that an action will have a significant effect, Federal agencies will begin the NEPA planning process with an Environmental Assessment (EA). The EA will serve to indicate and document whether the preferred alternative(s) is likely to have a significant effect.

This determination is generally conducted through the following EA process:

- Develop an Environmental Assessment (EA);
- Issue the Notice of Availability of Environmental Assessment (NOA);
- Provide for Public Review of Environmental Assessment; and

⁷ OPA regulations at § 990.23(a) and (b). *Human environment* means "...the natural and physical environment and the relationship of people with that environment" (NEPA regulations at § 1508.14). *Affect* means to "...have an effect on," the term *effect* referring to restoration actions on the human environment that have both beneficial and detrimental results (NEPA regulations at §§ 1508.3 and 1508.8). *Significance*, as used in this document, takes into account the context and intensity (severity) of the effects of the restoration action on the human environment NEPA regulations at § 1508.27).

⁸ NEPA regulations at §§ 1507.3 and 1508.4.

- Make a Determination of a:
 - ◆ Finding of No Significant Impact (FONSI); or
 - ◆ Likely Significant Effect - Begin Environmental Impact Statement (EIS) Process

There is no requirement that Federal agencies provide a Notice of Intent to Prepare an Environmental Assessment. However, once an EA is developed indicating the restoration alternatives considered and those preferred, Federal agencies should prepare a Notice of Availability of an Environmental Assessment (NOA). The EA is then available for public review and comment.

The time period for public review on the EA must be consistent with the trustee agency's NEPA requirements. Many Federal agencies either require, or strongly encourage, a thirty (30) calendar day public review period for an EA. However, under the NEPA regulations, an agency must make the EA available for public review for thirty (30) calendar days if the proposed action is, or is closely similar to, an action that normally requires an EIS, or if the nature of the proposed action is without precedent.⁹

After reviewing any comments received, the Federal agencies must then determine whether there is likely to be a significant effect on the human environment from the preferred restoration alternative(s).¹⁰ Where an effect is not expected to be significant, a Finding of No Significant Impact (FONSI) will be required. In this case, the EA will serve to indicate and document whether the preferred alternative(s) is likely to have a significant effect on the quality of the human environment. Where an effect is not expected to be significant, a FONSI should be documented with a brief explanation of the reasons for this action. Depending on particular agency requirements, the FONSI need not be published.

Where the EA indicates that the proposed restoration action is likely to result in a significant effect, an Environmental Impact Statement (EIS) will be required. In this case, the EA provides the foundation for an EIS.

⁹ NEPA regulations at § 1501.4(e)(2).

¹⁰ The NEPA regulations and individual agency regulations implementing NEPA contain factors to consider in making the determination of *significance*. Under NEPA, restoration alternatives are evaluated prior to implementation.

2.3.3 Environmental Impact Statement (EIS)

An Environmental Impact Statement (EIS) is required where the EA indicates the preferred restoration alternative(s) is likely to have a significant effect on the quality of the human environment. However, in some instances, a significant effect may be anticipated early in the planing process. In such instances, an EIS may be initiated without first conducting an EA.

The EIS is developed through the following process:

- Determine the Likelihood of Significant Effect;
- Publish the Notice of Intent to Prepare an Environmental Impact Statement (NOI/EIS);
- Develop the Draft Environmental Impact Statement (DEIS);
- Publish the Notice of Availability of DEIS (NOA for DEIS);
- Consider Public Comments Received and Make Necessary Changes to DEIS;
- Prepare the Final Environmental Impact Statement (FEIS);
- Publish the Notice of Availability of EIS (NOA for FEIS); and
- Prepare the Record of Decision.

Where Federal agencies determine that an action is likely to have a significant effect on the quality of the human environment, they must issue a Notice of Intent to Prepare a Draft Environmental Impact Statement (NOI/EIS). This NOI must be published in the Federal Register.¹¹

Once the DEIS is developed, it must be made available for public review for a minimum of forty-five (45) calendar days. The DEIS, or a Notice of its Availability (NOA), must be published in the Federal Register. Agencies should notify the public commensurate with the nature and extent of the potential effects on the human environment, consistent with NEPA and the Federal agency's NEPA requirements. The public comment period begins with the date of the publication of the NOA in the Federal Register.

¹¹ NEPA regulations at § 1501.7.

In preparing the FEIS, the Federal agencies must consider all public comments on the DEIS and incorporate any changes made to the DEIS in response to public comments. The Federal agencies must publish a NOA for the FEIS. No decision may be made concerning the proposed action until ninety (90) calendar days after publication of the NOA of the DEIS or until thirty (30) days after the NOA of the EIS, whichever is later.¹²

Once the EIS is final, Federal agencies must prepare a Record of Decision (ROD)¹³ for inclusion in the Administrative Record. The ROD summarizes the trustees' decisionmaking process. The ROD must be made publicly available, consistent with the Federal trustees' NEPA requirements.

2.4 Combining OPA and NEPA Planning Processes

2.4.1 Restoration Planning and the EA

The OPA regulations lay out a public planning process for restoration. The OPA regulations were specifically designed to complement and work with the NEPA planning process.¹⁴ The NEPA regulations also state that "Federal agencies shall to the fullest extent possible . . . [i]ntegrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively."¹⁵ Therefore, to ensure procedural compliance and efficient planning activities, trustees should consider combining the two planning processes. Since many of the elements of restoration planning under OPA are consistent with NEPA planning elements, the two can be combined as illustrated in Exhibit 2.1.

For most NRDA actions performed under OPA where it is uncertain whether an action will cause a significant effect on the quality of the human environment, trustees will begin restoration planning with the development of an EA. Therefore, although no Notice of Intent to Prepare an EA (NOI/EA under NEPA) is required by NEPA, trustees will expedite the planning process if the Notice of Intent to Conduct Restoration Planning (NOI/RP under the OPA regulations) also includes the statement that the DRP is intended to serve the purposes of an EA.¹⁶

¹² NEPA regulations at § 1506.10(b).

¹³ NEPA regulations at § 1505.2.

¹⁴ OPA regulations at § 990.23.

¹⁵ NEPA regulations at § 1500.2(c).

¹⁶ The content of the NOI is discussed in Chapter 3.

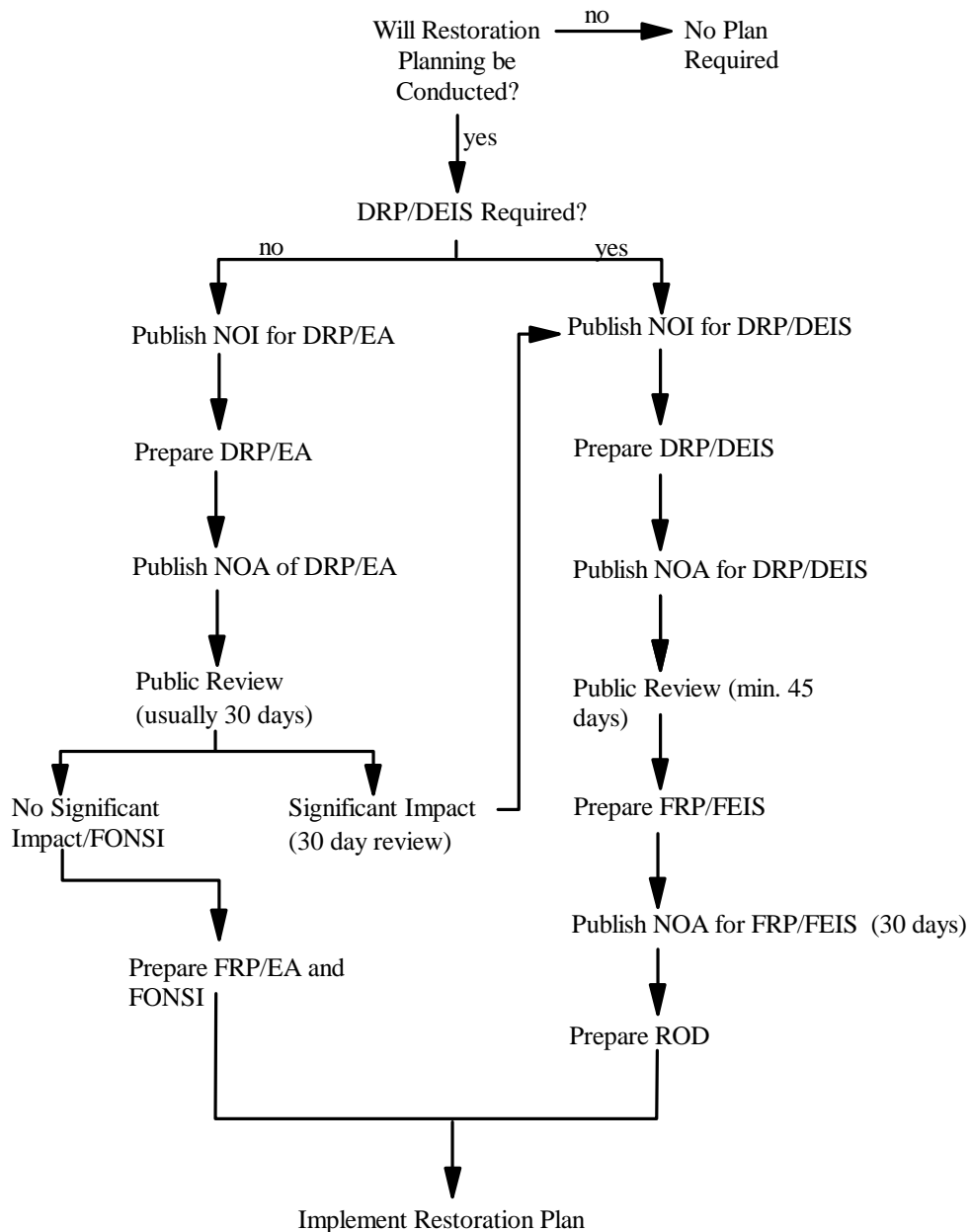


Exhibit 2.1 Restoration plan development. (NOI = Notice of Intent, NOA = Notice of Availability, DRP = Draft Restoration Plan, FRP = Final Restoration Plan, EA = Environmental Assessment, DEIS = Environmental Impact Statement, FEIS = Final Environmental Impact Statement, FONSI = Finding of No Significant Impact, ROD = Record of Decision)

When trustees develop the DRP, the EA should be included in the DRP.¹⁷ Once the combined DRP/EA is prepared, trustees will publish a Notice of Availability (NOA) for the DRP/EA to begin the public review. The time period for public review on the DRP/EA must be consistent with the trustee agency's NEPA requirements and those of the OPA regulations. The OPA regulations provide for a thirty-day review of the DRP. Many Federal agencies either require or strongly encourage a thirty-day public review of an EA also. Therefore, to comply with the various required or suggested review periods, the DRP/EA must be available for public review and comment for a minimum of thirty (30) calendar days.

Based upon this review and the agency's analysis, a determination of the significance of effects is made. If no significant effect is expected, the Federal agency then prepares the FRP and a FONSI. Although the NEPA regulations do not require an EA to address public comments, the OPA regulations do require that trustees must adequately consider all public comments on the DRP. The means by which a trustee agency requests, considers, and responds to public comments on the DRP is at the discretion of the trustee.¹⁸ However, the DRP/EA must also be consistent with the trustee agency's NEPA requirements.

The FONSI may include a summary of the FRP/EA, or simply be attached to the FRP/EA. Although public review is not required for a FONSI, public availability of the FONSI is mandatory.¹⁹

2.4.2 Restoration Planning and the EIS

For some incidents under OPA, trustees may determine, either initially or through the EA, that a restoration action is likely to have a significant effect on the quality of the human environment. In such instances, trustees must also publish a Notice of Intent to Prepare An Environmental Impact Statement (NOI/EIS under NEPA). For the sake of efficiency, the information in this NOI/EIS should be included in the Notice of Intent to Conduct Restoration Planning (NOI/RP under the OPA regulations). This combined Notice must be published in the Federal Register since this is a NEPA requirement for a NOI/EIS for preparation of an EIS.

Once the DRP/DEIS is developed, it must be made available for public review for a minimum of forty-five (45) calendar days. The DRP/DEIS, or a notice of its availability (NOA), must be published in the Federal Register. However, public review is not merely limited to a Federal Register notice. Trustees should notify the public commensurate with the nature and extent of the incident and potential environmental effects of the restoration actions on the human environment, consistent with NEPA and the Federal agency's NEPA requirements.

¹⁷ A common format is also described in Chapter 3.

¹⁸ OPA regulations at § 990.55.

¹⁹ NEPA regulations at § 1501.4(e)(1).

The FRP/EIS must consider all public comments on the DRP/DEIS and incorporate any changes made to the DRP/DEIS in response to public comments. No decision may be made concerning the proposed action until thirty (30) calendar days after the NOA of the FRP/FEIS or ninety (90) calendar days after publication of the NOA of the DRP/DEIS, whichever is later.²⁰

Under the OPA regulations, once the FRP is developed, the trustees must present a written demand to the RP(s) requesting implementation or funding of the FRP.²¹ Under the NEPA regulations, when the final decision is made on the EIS, the Federal agencies must document that decisionmaking in the Record of Decision (ROD). This ROD should be referenced in the Demand required by the OPA regulations.

2.5 Regional Restoration Plans or Existing Restoration Projects

The impact of small incidents may represent a significant concern for trustees, particularly where small incidents may have cumulative impacts. To achieve OPA's mandate to restore injured natural resources and services regardless of the type and scale of those injuries, trustees are encouraged to identify existing Regional Restoration Plans or other existing restoration projects that may be applicable in the event of an incident. Regional restoration planning may consist of compiling databases that identify existing, planned, or proposed restoration projects that may provide appropriate restoration alternatives for consideration in the context of specific incidents. Plans or projects developed on a regional basis (e.g., ecosystem, landscape, watershed, or any other basis) appropriate so long as natural resources and/or services comparable to those expected to be injured by an incident are addressed in the plans.

If a Regional Restoration Plan or existing restoration project, or some component of the Plan or project, is proposed for use, Federal trustees may be able to link or *tier* their NEPA analysis to an existing EIS.²² The Regional Restoration Plan or project may only be selected as the preferred alternative(s) after considering a range of restoration alternatives and evaluating all these restoration alternatives according to the criteria listed under the OPA regulations.²³

²⁰ NEPA regulations at § 1506.10(b).

²¹ OPA regulations at § 990.62.

²² Linking or *tiering* to an existing EIS may be possible when there is a sufficient foundation in support of the proposed restoration plan. See NEPA regulations at §§ 1502.4, 1502.20, and 1508.28.

²³ OPA regulations at § 990.54(a).

Trustees may use all or part of a Regional Restoration Plan or existing restoration project where it:

- Was developed with, or is subject to, public review and comment;
- Will adequately compensate the environment and public for injuries resulting from the incident;
- Addresses, and is currently relevant to, the same or comparable natural resources and services as those identified as having been injured; and
- Allows for reasonable scaling (i.e., determining the areal and temporal extent needed for restoration actions) relative to the incident

Where a Regional Restoration Plan or existing restoration project is considered as the foundation for the tiering process, trustees must describe the relevance between it and the proposed restoration alternatives. Under such circumstances, trustees must issue a Notice of Intent (NOI/RRP) to Use a Regional Restoration Plan or Existing Restoration Project that must be made publicly available.²⁴

2.6 Trustee Coordination

Each restoration plan should have an identified trustee to facilitate its preparation, similar to the *lead agency* under NEPA. Where more than one agency is involved, a determination of the Lead Administrative Trustee (LAT) is made by the trustees involved, whether a Federal, state, or tribal LAT. The remaining agencies are co-trustees (similar to *cooperating agencies* under NEPA). The trustees determine who is responsible for developing the various components of the restoration plan.²⁵ Working relationships must be resolved on a case-by-case basis, understandings for which may be detailed in pre-incident or incident-specific agreements (e.g., Memorandum of Understanding). Such coordination will help to ensure that full restoration is achieved without double recovery of damages.

²⁴ OPA regulations at § 990.56(b).

²⁵ OPA regulations at § 990.14(a) and NEPA regulations at §§ 1501.5 and 1501.6.